

SERVED: September 1, 1992

NTSB Order No. EA-3655

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 11th day of August, 1992

THOMAS C. RICHARDS,)	
Administrator,)	
Federal Aviation Administration,)	
)	
Complainant,)	
)	Docket SE-10436
v.)	
)	
JAMES G. COUCH,)	
)	
Respondent.)	
)	

OPINION AND ORDER

Respondent has appealed from the oral initial decision Administrative Law Judge Jerrell R. Davis issued in this proceeding on April 4, 1990, at the conclusion of a two-day evidentiary hearing.¹ By that decision the law judge affirmed in part an order of the Administrator suspending respondent's

¹An excerpt from the hearing transcript containing the initial decision is attached.

airline transport pilot (ATP) certificate for 45 days² on allegations involving two distinct incidents, one occurring on March 11, 1988 (Count I)³ and the other on August 12, 1988 (Count II).

The Administrator's order, which was filed as the complaint in this matter,⁴ alleges with regard to Count II in pertinent part as follows:

6. On August 12, 1988, you acted as pilot-in-command of Civil Aircraft N2229X, a Piper Model PA-28-181 aircraft, the property of another, on a flight which departed Runway 31 at Gness Field, Novato, California at approximately 1030 local time.

7. Immediately after takeoff, you executed a 90° banked turn to the crosswind leg while at a location in the vicinity of the departure end of Runway 31.

8. Said aerobatic maneuver was performed at an altitude of

²The law judge modified the sanction ordered by the Administrator from 150 days to 45 days; 15 days for Count I, and 30 days for Count II. The Administrator has moved to withdraw his appeal of the law judge's initial decision. That motion is granted.

³Count I concerns a gear-up landing and the operation of an aircraft without a flight manual onboard, in violation of §§ 91.31(b) and 91.9 of the Federal Aviation Regulations (FAR), 14 C.F.R. part 91. On June 25, 1990, respondent filed an appeal brief with regard to Count II. That appeal brief was timely filed, in accordance with a previously granted extension of time.

On July 6, 1990, respondent filed a motion for leave to file an amendment to the appeal brief with regard to Count I, but offered no explanation for his untimeliness. The Administrator opposes the motion. Section 821.48(a) of the Board's Rules of Practice require that an appeal must be perfected by the filing of an appeal brief within 50 days after an oral initial decision has been rendered. As respondent's failure to file a timely appeal brief with regard to Count I is not excusable for good cause shown, his motion is denied. The remainder of this decision will address only Count II.

⁴As amended at the hearing.

approximately 50 feet above the surface.

9. Shortly thereafter, you executed a similar 90° banked turn to the downwind leg while at a location approximately a mile from the departure end of the runway.

10. Said second 90° banked turn was performed at an altitude of approximately 100 feet above the surface.

11. Said 90° banked turns described in paragraphs 7 and 9 above constituted aerobatic maneuvers.

As a result, the Administrator alleged that respondent had violated FAR sections 91.71(d) and 91.9.⁵

Respondent raises two issues in this appeal. First, he contends that the finding of a violation of section 91.71(d) should be set aside as the regulation fails to contain a definition of what constitutes "normal flight," and therefore his operation cannot be measured by any identifiable standard. Second, respondent asserts that the Administrator failed to sustain his burden of proof because the conflict in the

⁵FAR §§ 91.71(d) and 91.9 provided at the time of the incident as follows:

"§ 91.71 Acrobatic flight.

No person may operate an aircraft in acrobatic flight-

(d) Below an altitude of 1,500 feet above the surface....

For the purposes of this section, acrobatic flight means an intentional maneuver involving an abrupt change in an aircraft's attitude, or abnormal acceleration, not necessary for normal flight.

§ 91.9 Careless or reckless operation.

No person may operate an aircraft in a careless or reckless manner so as to endanger the life or property of another."

eyewitnesses' testimony makes their testimony unreliable. The Administrator has filed a brief in reply, urging the Board to affirm the initial decision in its entirety.

Upon consideration of the briefs of the parties, and of the entire record, the Board has determined that safety in air commerce or air transportation and the public interest require affirmation of the Administrator's order, as modified by the law judge. For the reasons that follow, we will deny respondent's appeal.

The Administrator presented the testimony of four percipient witnesses to the alleged acrobatic maneuvers, as well as the testimony of the investigating inspector. Each of the four eyewitnesses observed respondent's takeoff from a different vantage point on the airfield. All of them are pilots, with varying levels of flying experience. They all considered respondent's takeoff "unusual."

The first witness, a private pilot employed by the fixed-based operator at Gness Field, was standing in the airport manager's office at the time of the takeoff.⁶ He saw the aircraft rotate somewhere before midfield. As respondent's aircraft was about 200 feet from the end of the runway it rolled into almost a 90° bank, held it for a few seconds and then rolled

⁶The airport manager's office is on the second floor of a building overlooking Runway 31, nearly 1,000 feet from the departure end.

back to a 45° bank.⁷ Respondent then turned crosswind and began to climb.

The airport manager was seated in his office at the time of the takeoff. This eyewitness holds an airline transport pilot certificate and has approximately 6500 hours of flying experience. He described a normal departure and a normal lift-off, but testified that at approximately 50 feet the aircraft leveled off and appeared to accelerate. According to him, when respondent's aircraft passed the departure end of the runway, it appeared to roll into a 90° bank turn. When the aircraft banked, the wings seemed to be vertical rather than horizontal.

A private pilot was at the run-up pad, about to take an instrument lesson from a flight instructor. She testified that respondent accelerated, rotated, pulled off the runway maintaining a very low altitude of about 50 feet, and then did a "dramatic" right bank and climbed immediately to the downwind leg. She defines "dramatic" as 70° to 85°, and said that from her perspective the aircraft wings seemed to almost point straight down.

The flight instructor present at the run-up pad is an ATP with over 2800 hours of flying experience, including 400 hours in this type aircraft and 30 hours in the aircraft respondent was operating at the time of the incident. According to him,

⁷According to his written statement, the aircraft was at an altitude of no more than 50 feet above ground level.

respondent was at 20-30 feet above ground level, and after levelling off at that altitude, which is not normal in his opinion, respondent banked at an angle of 70° to 75° for 10 to 12 seconds.⁸ He could see the upper surface of both wings clearly. In his opinion, the maneuver was acrobatic.

According to the FAA inspector who investigated this incident, normal flight is straight and level, and not in excess of 60°. Nor were respondent's low altitude and excessive speed⁹ normal for Gness Field takeoffs. Respondent's maneuver, as described by the eyewitnesses, was definitely acrobatic in his opinion. It was also unnecessary and risky, he testified.

Respondent denies operating the aircraft in acrobatic flight. He claims that the airport manager, with whom he has an antagonistic relationship, persuaded the other witnesses to fabricate their testimony.

The law judge in his initial decision rejected respondent's denial, describing it as not convincing. While recognizing the inconsistencies in the eyewitnesses' various descriptions, he concluded that there was sufficient evidence to support a finding that respondent had made at least one 90° turn to the right at an

⁸The law judge did not sustain the Administrator's allegation that respondent performed a second aerobatic maneuver on the downwind, because the airport manager and the flight instructor testified that they did not see the second 90° bank to the downwind leg which was described by the other witnesses.

⁹According to the flight instructor, the excessive speed was necessary in order to execute the maneuver in that type aircraft.

angle of bank ranging from 70° to 75°, and that this maneuver was acrobatic.

FAR section 91.71(d) defines acrobatic flight as "...an intentional maneuver involving an abrupt change in an aircraft's attitude, an abnormal attitude, or abnormal acceleration, not necessary for normal flight." Respondent contends on appeal that the law judge erred in sustaining a violation of this section because the regulation fails to define that which is "normal flight." The Administrator in his reply brief concedes that the regulation does not define acrobatic flight in terms of specific degrees of pitch or banking, but asserts that such specificity is unnecessary and would be undesirable, given the wide variation in aircraft and their design capabilities. In Administrator v. Willison, 2 NTSB 1131 (1974), the Board reached a similar conclusion, finding that the regulation was not unreasonably vague or uncertain, though noting that the Board's traditional position has been that we lack jurisdiction to rule on the constitutional validity of regulations. See also Administrator v. Nazimek, NTSB Order No. EA-2672 at 9, ftn. 11 (1988), appeal dismissed, No. 88-1922 (7th Cir. 1989).

In any event, even respondent testified that he would consider an angle of bank in excess of 60° an abnormal or acrobatic maneuver, and therefore even using his own definition his maneuver was abnormal, given the scenario described by the Administrator's witnesses. Since the law judge found that their

testimony did, as a matter of credibility, establish that respondent made at least one 90° turn to the right at an angle of bank ranging from 70° to 75°, and respondent offers us no persuasive reason to disturb that finding,¹⁰ we concur in the law judge's conclusion that respondent operated the aircraft in acrobatic flight. The initial decision is therefore, affirmed.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The Administrator's order, as modified by the initial decision, and the initial decision are affirmed; and
3. The 45-day suspension of respondent's airline transport pilot certificate shall begin 30 days after service of this order.¹¹

VOGT, Chairman, COUGHLIN, Vice Chairman, LAUBER, HART and HAMMERSCHMIDT, Members of the Board, concurred in the above opinion and order.

¹⁰The inconsistencies among each eyewitness' account lends credibility to their testimony, in our view, rather than being indicative of fabrication, as respondent suggests.

¹¹For purposes of this order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR §61.19(f).